

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS : MDL NO. 1203
(PHENTERMINE/FENFLURAMINE/
DEXFENFLURAMINE) :
PRODUCTS LIABILITY LITIGATION :
THIS DOCUMENT RELATES TO: :
SHEILA BROWN, et al. :
v. :
AMERICAN HOME PRODUCTS :
CORPORATION : CIVIL ACTION NO. 99-20593

MEMORANDUM AND PRETRIAL ORDER NO.

Bartle, C.J.

February 2, 2007

Before the court is the motion of Carrie Taylor, a Class Member in the Diet Drug Nationwide Class Action, "for leave to appear *instanter* and to accept late settlement registration." Ms. Taylor failed to obtain a private echocardiogram and submit her Blue Registration Form to the American Home Products Settlement Trust (the "Trust") before the deadlines to register for benefits and preserve her opt-out rights under the Diet Drug Nationwide Class Action Settlement Agreement ("Settlement Agreement") with Wyeth, Inc.¹ She maintains, however, that her delay was due to "excusable neglect."

1. Prior to March 11, 2002 Wyeth was known as American Home Products Corporation.

I.

According to Ms. Taylor's motion and accompanying affidavit she was prescribed and took the diet drugs commonly known as fen-phen² from approximately January 1997 until June 1997. Beginning in February 2003 Ms. Taylor began to experience health problems and sought medical attention. She was given two echocardiograms, one on April 15, 2003, and a second on April 29, 2003. She was subsequently given a heart catheterization on May 16, 2003, after which her doctors diagnosed her with mitral valve disease and recommended that she undergo mitral valve repair/replacement surgery. Ms. Taylor underwent mitral valve repair/replacement surgery on July 18, 2003.

Ms. Taylor maintains that the most likely cause of her mitral valve disease was the diet drugs she ingested. However, she claims that she was not aware of the ongoing litigation concerning diet drug related injuries until approximately the time of her mitral valve repair/replacement surgery. At that time she hired a lawyer to pursue her claims as a class member under the diet drug class action settlement. Ms. Taylor's first lawyer failed to take any steps to secure Ms. Taylor's registration with the Trust, in part because the lawyer was

2. "Fen-Phen" is widely used to refer to the combination of the diet drugs Fenfluramine and Phentermine. Fenfluramine, marketed under the brand name Pondimin, and the later related drug Dexfenfluramine, marketed under the brand name Redux, were sold by Wyeth and are the subject of the Settlement Agreement. Ms. Taylor does not specify whether she was prescribed Pondimin or Redux.

unable to obtain medical records showing that Ms. Taylor had been prescribed fen-phen.³ Ms. Taylor retained her current lawyer in January 2004. In February 2004, he successfully located her medical records. Ms. Taylor then submitted a Blue Registration Form⁴ to the Trust on March 3, 2004 and a Green Benefits Form⁵ in July 2004.

By letter dated September 1, 2004, the Trust, which was established to pay benefits to qualifying Class Members, informed Ms. Taylor's lawyer that it would not process Ms. Taylor's claim. The letter read, in part:

As you are aware, the deadline for registering with the Settlement was not later than May 3, 2003. Ms. Taylor's claim is not only late by that deadline, but also for the deadline for a privately obtained echocardiogram. Ms. Taylor had an echocardiogram in April of 2003, but the deadline for a privately obtained echocardiogram under the Settlement Agreement was January 3, 2004.⁶

3. Ms. Taylor claims that she was prescribed fen-phen by Dr. Passias at Suburban Internal Medicine in Columbus, Ohio. Dr. Passias left the practice of medicine and relinquished his medical license in 1998.

4. The Blue Registration Form was one of the registration forms available to Class Members to register for benefits with the Trust.

5. Class Members were required to complete the Green Benefits Form, in addition to the Blue Registration Form, to receive Matrix Benefits from the Trust under the Settlement Agreement.

6. The reference to January 3, 2004 is a typographical error. As discussed in more detail below, the deadline to obtain a private echocardiogram under the Settlement Agreement was January 3, 2003.

Mem. in Supp. of Pl.'s Mot. to Appear Instantly, Ex. B.

After receiving notice from the Trust that it would not process her claim, Ms. Taylor filed the current motion.

II.

The Settlement Agreement approved by this court in Pretrial Order ("PTO") No. 1415 provides strict deadlines for Class Members to seek Matrix Benefits⁷ from the Trust. The Settlement Agreement provides, in part:

The following Class Members, and only such Class Members, shall be entitled to the compensation benefits from Fund B ("Matrix Compensation Benefits"):

- a. Diet Drug Recipients who have been diagnosed by a Qualified Physician as FDA Positive or as having Mild Mitral Regurgitation by an Echocardiogram performed between the commencement of Diet Drug use and the end of the Screening Period and who have registered for further settlement benefits by Date 2, [May 3, 2003]

Settlement Agreement § IV.B.1.a. (emphasis added).

This Settlement Agreement provision imposes two deadlines on Class Members. First, Class Members who did not participate in the Screening Program⁸ were required to obtain a private echocardiogram and consequently have been diagnosed with

7. Matrix Benefits are payable from Fund B, created in the Settlement Agreement to compensate Class Members who have developed Matrix-level conditions, or will develop those conditions in the future. Settlement Agreement § IV.B.-C.

8. The Screening Program provided Transthoracic Echocardiograms and associated interpretive physician benefits to eligible Class Members. Settlement Agreement § I.50. See also id. at §§ IV.A.1.a & IV.A.2.b.

FDA Positive or Mild Mitral regurgitation from the time they began using diet drugs until January 3, 2003, the end of the Screening Period. Second, Class Members were required to register with the Trust by May 3, 2003. Numerous forms, including the Blue Registration Form were available to Class Members to register with the Trust. As specified in the Settlement Agreement, Class Members must meet both deadlines to be entitled to Matrix Benefits.

The deadlines imposed by the Settlement Agreement may be extended if the movant can show his or her failure to meet the deadlines was due to "excusable neglect." In In re Orthopedic Bone Screw Prods. Liab. Litig., 246 F.3d 315, 323 (3d Cir. 2001), our Court of Appeals reiterated the Supreme Court's analysis of excusable neglect as set forth in Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship., 507 U.S. 380 (1993). Four factors should be evaluated when deciding whether excusable neglect exists: (1) the danger of prejudice to the non-movant;⁹ (2) the length of the delay and its potential effect on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. Pioneer, 507 U.S. at 395; Bone

9. We note that a significant amount of time has passed since Ms. Taylor filed her motion. In considering the motion, we shall look at the status of the Settlement Agreement and the Trust as it was in late 2004. It would be inequitable to consider the present circumstances, more than two years after this motion was initially filed and fully briefed by the parties.

Screw, 246 F.3d at 322-23. We shall discuss each of these factors in turn.

Ms. Taylor argues that allowing her late registration with the Trust would pose no danger of prejudice to non-movants since Wyeth has already funded the Trust. Including her claim, Ms. Taylor maintains, will not affect the total amount Wyeth will have to pay into the Trust. Ms. Taylor's argument does not take into consideration that there is more at stake in this litigation than simply Wyeth's funding obligations. The finality provided by the Settlement Agreement to Wyeth, the Trust and other Class Members has been of paramount importance throughout the administration of the Settlement Agreement. Finality is not only important to Wyeth, but also to the Trust so that it can consider applications for Matrix Benefits and provide those benefits to injured Class Members in a timely manner. If Ms. Taylor's motion was the only one of its kind, her late registration may pose little danger of prejudicing the non-movants. Ms. Taylor, however, is certainly not alone. "Although the admission of any particular claimant may not in itself cause a substantial drain on the Trust, allowing this claimant to escape the firm deadlines set forth in the Settlement Agreement ... will surely encourage others to seek the same relief." PTO No. 3923, at 3.

The length of the delay in meeting the registration deadlines must also be considered. The January 3, 2003 deadline to obtain a private echocardiogram was not an arbitrary date. This date, marking the end of the Screening Program, was

carefully chosen in light of evidence that the later the diagnosis the greater the likelihood that the Class Member's mitral valve regurgitation was not caused by diet drugs. In re Diet Drugs, 2000 WL 1222042, at *46-*47 (E.D. Pa. Aug. 28, 2000). Diet drug induced mitral valve regurgitation is not latent and can be detected by an echocardiogram after the Class Members ceases use of the drugs. Id. Similarly, the deadline to register with the Trust was set to give Class Members ample time to complete the necessary forms and submit them to the Trust. In Ms. Taylor's case, she did not have an echocardiogram until three months after the deadline to obtain a private echocardiogram had passed and did not submit the Blue Registration Form to the Trust until ten months after the registration deadline. This is not an insignificant amount of time. To allow Ms. Taylor these lengthy extensions would undermine the finality of the Settlement Agreement and open the door to similarly situated Class Members who are presently time-barred.

Ms. Taylor also argues that she has valid reasons for missing the deadlines and that the delay was not within her control. She maintains that she was not aware of the diet drug class action until approximately July 18, 2003 and that once she was aware of the class action, there was further delay in registering with the Trust because her first lawyer was unable to locate her prescribing physician.

Rule 23 of the Federal Rules of Civil Procedure states:

"For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). An extensive notice plan was put in place to inform all Class Members of the Settlement Agreement. See PTO No. 1415 at 79-87. We have previously stated that the notice plan was the "best notice practicable under the circumstances" and concluded that it was "highly successful." PTO No. 997 ¶ 15 at 8; PTO No. 1415 at 83. The publicity surrounding the Settlement Agreement was not limited to just television, which Ms. Taylor says she did not watch. A summary notice was prepared and published in a variety of newspapers and magazines. PTO No. 1415 at 81-82. Analysis of the notice plan concluded that "97% of women between the ages of 25 and 54 viewed one or more forms of televised or printed notice an average of 10 times." Id. at 22. We have concluded in the past, and still believe, that the notice plan well exceeded the "best notice practicable under the circumstances."

Furthermore, in regards to Ms. Taylor's late registration with the Trust, the additional delay while her lawyers located medical records to show ingestion was unnecessary. Ms. Taylor argues that since her lawyer was unable to locate the prescribing physician to obtain her medical records or a declaration that she was prescribed Pondimin or Redux, she

could not register with the Trust. However, the Settlement Agreement states:

Submission of a PINK FORM or BLUE FORM that has not been fully completed shall be sufficient to "register" the Class Member for benefits, provided, however, that the missing information must be submitted in order for the Class Member to receive any benefits under this Settlement Agreement.

Settlement Agreement § VI.C.2.b.

Ms. Taylor's first lawyer's inability to locate the prescribing physician therefore did not preclude her from taking the initial step of registering with the Trust.

Finally, we have no reason to doubt that Ms. Taylor acted in good faith. However, the danger of prejudice to non-movants and the length of, and reasons for, the delays weigh heavily in favor of finding that Ms. Taylor's actions do not constitute excusable neglect. Accordingly, Ms. Taylor is not entitled to extensions of the applicable deadlines and she is out of time to register with the Trust for benefits.

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AND NOW, on this 2nd day of February, 2007, for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that the motion of Carrie Taylor to appear instanter and accept late settlement registration is DENIED.

BY THE COURT:

/s/ Harvey Bartle III

C.J.